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Archie O. Dawson

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*ARCHIE O. DAWSON**

NEEDLESS to say, any review of Supreme Court opinions for the last twelve months must be limited to a few important decisions. Space does not permit a review of all of them. For example, in the calendar year 1954, the Supreme Court handed down 80 decisions, covering 960 pages of text, and this is exclusive of decisions on the granting or denying of applications for writs of certiorari or petitions for rehearing. This review limits itself to a mere touching upon the problems involved, without venturing to discuss at length the reasons given for or against the decisions either in the majority opinions or in the dissents. For convenience, the cases are grouped under appropriate subheadings:

CONSTITUTIONAL LAW

In the field of constitutional law, perhaps the most important decision was *Brown v. Board of Education*,[1] by which segregation in the public school system was declared illegal, thus writing another chapter in the legal history of segregation that began more than 50 years ago with *Plessy v. Ferguson*,[2] which set forth the theory in the field of transportation of separate but equal facilities, a theory that found transferal into the fields of education, housing, etc. It is interesting to note at this time that John Marshall Harlan of the Court of Appeals for the Second Circuit, whose grandfather wrote the prophetic dissent in the *Plessy* case, has just been confirmed as a new member of the Supreme Court. The decision in the *Brown* case was not unexpected inasmuch as the Court had been moving in that direction in other areas.[3]

SUBVERSIVE ACTIVITIES

The year 1954 produced no notable opinions growing out of trials of communists under the Smith Act[4] for advocating the violent overthrow of the government, such as took place in *Dennis v. United States*.[5]

* Judge of the United States District Court for the Southern District of New York. Address Delivered at a Forum of the New York County Lawyers Association, held at its Home of Law on April 21, 1955.

1. 347 U.S. 483 (1954).
2. 163 U.S. 537 (1896).
3. Barrows v. Jackson, 346 U.S. 249 (1953) (housing); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (higher education); Shelley v. Kraemer, 334 U.S. 1 (1948).
4. 18 U.S.C.A. § 2385 (1948).
5. 341 U.S. 494 (1951).

Also, there were no espionage or treason cases similar to *Rosenberg v. United States*.[6] However, there was an ancillary proceeding that stemmed from the *Dennis* case in *Sacher v. Association of the Bar of the City of New York*.[7] In that case, Harry Sacher, who had been counsel for certain defendants, had been held in contempt of court for his conduct in the course of the trial. As a result thereof, Sacher served six months for contempt and disbarment proceedings were commenced which resulted in an order permanently disbarring him from practice before the United States District Court for the Southern District of New York. A majority of the Supreme Court found that he had been sufficiently punished by the jail sentence and set aside the disbarment order. However, it would appear to one who, as a member of the District Court, is an interested observer, and who has the day to day job, unlike the Supreme Court, of keeping in bounds lawyers who overstep the proper limits of advocacy, that the question was not whether the punishment was too severe, but whether the District Court clearly abused its discretion. However, the Supreme Court disagrees, and thereby makes the job of the District Court judge much more difficult.

The passage of time produced an interesting situation that stemmed from this reversal for thereafter, in late 1954 and in early 1955, Harvey Matusow, who had been a witness for the government in certain communist prosecutions, recanted his previous testimony and professed to have perjured himself. This produced a proceeding in the United States District Court for the Southern District of New York, which is still continuing, *United States v. Elizabeth Gurley Flynn*, in which it is sought to overturn the convictions of a number of convicted communists and in which the same Harry Sacher, now restored to practice in our Court and now with impeccable court demeanor, cross-examined one of the prosecutors, Roy Cohn, in a nimble battle of wits.

Aliens and Citizenship

In the case of *Galvan v. Press*[8] a majority of the Court held that an alien who had joined the Communist Party without knowledge of its advocacy of violence was deportable. This case reaffirmed the principle that the power of Congress over the admission of aliens and their right to remain is necessarily very broad, inasmuch as it is founded on the right of the sovereign to conduct foreign relations and maintain national security, and that, therefore, an alien's liberty is largely at the mercy of Congress and not protected by ordinary constitutional guaranties.

6. 346 U.S. 273 (1953).
7. 347 U.S. 388 (1954), reversing 206 F. 2d 358 (2d Cir. 1953).
8. 347 U.S. 522 (1954).

In *United States* ex rel. *Accardi v. Shaughnessy*,[9] another deportation proceeding, the Supreme Court remanded the action on the ground that the denial of an offer of proof that Accardi's application for suspension of deportation had been prejudged by the Department of Justice, including the Board of Immigration Appeals, through the public issuance by the Attorney General, who appoints that Board, of a list of unsavory characters that included the petitioner. A majority of the Court held that the Board of Immigration Appeals must render its decision on the petition of an alien seeking suspension of a deportation order free from any dictation of the Attorney General and that, therefore, the alien was entitled to a hearing on a habeas corpus petition to show that because the Attorney General had included his name on a list of unsavory characters which had previously been circulated among Board employees, it was impossible for him to secure fair consideration before the Board of Immigration Appeals. In an interesting dissent, four justices, led by Mr. Justice Jackson, said:

"Petitioner admittedly is in this country illegally and does not question his deportability or the validity of the order to deport him. . . .

"Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law but merely establishes a condition precedent to exercise of discretion by the Attorney General . . ."[10]

Upon remand to the District Court, proof was adduced to show that petitioner had been discriminated against through the publication by the Attorney General of the list of unsavory characters, but the District Court, in again denying the writ of habeas corpus, found that there had been no abuse of discretion by the Board. Upon appeal to the Court of Appeals,[11] Judge Frank, in a lengthy opinion, held that the state of a man's mind is such that it was impossible on the record to say that the members of the Board of Immigration Appeals, purely on the basis of a judicial directive, could so free their minds from the effect of the Attorney General's list as to render an impartial and unprejudiced judgment and directed that the writ be issued.

The present status of petitioner's deportation proceeding is an interesting speculation, for it would appear from Judge Frank's opinion

9. 347 U.S. 260 (1954).

10. Id. at 269.

11. 219 F. 2d 77 (2d Cir. 1955).

that petitioner would, under the circumstances, be unable to obtain a impartial and unprejudiced decision from the Board of Immigratio Appeals on his application for suspension of his deportation. This woul appear to produce an endless cycle, for petitioner would have the righ to an administrative decision from the Board, but the Court has decide that the Board is incapable of reaching a decision. And so petitione who admittedly is subject to deportation remains here. Only Lewis Car roll in his "Alice in Wonderland" could do justice to this situation.

Restraints on Freedom of Speech

An interesting question in this area was presented in *United States v Harriss*,[12] where the constitutionality of the Federal Regulation of Lob bying Act[13] was upheld with interesting dissents by Mr. Justice Douglas[14] and Mr. Justice Jackson.[15] This act, which requires a reporting of fund solicited, received, or expended for the purpose of lobbying, was at tacked on the ground that it was so vague as to make it impossible t determine the scope of its authority. There is no doubt that the state within the exercise of its police power, may control the activities of it citizens so as to limit the freedoms guaranteed by the First Amendmen —freedom to speak, publish, and petition the government. The cases s holding are far too numerous to enumerate, the latest being *Saia v New York*[16] and *Kovacs v. Cooper*.[17] The majority, relying upo the rule of statutory construction that if a general class of offenses ca be made constitutionally definite by a reasonable construction of th statute, the Court is under duty to give the statute that constructio found that the general class of offenses to which the statute was directe was plainly within its terms, and that even though marginal cases cor ceivably could arise, the statute was not so vague as to be struck ou Nor did the Court find that the purposes set forth in the act were s vague as to make it unconstitutional. In dissenting, Mr. Justice Dougla commented on the fact that while he was in sympathy with the effor of the Court to save a statute from the charge that it was so vague an indefinite as to be unconstitutional, he was forced to conclude that whe such a statute could easily ensnare people who had done no more tha exercise their constitutional rights of speech, assembly, and press, it w too dangerous for use. He concluded that the acts forbidden were s vague that men of common intelligence would necessarily have to gue

12. 347 U.S. 612 (1954).
13. 60 Stat. 840-842 (1946), 2 U.S.C.A. §§ 261-270 (Supp. 1954).
14. 347 U.S. at 628.
15. 347 U.S. at 633.
16. 334 U.S. 558 (1948).
17. 336 U.S. 77 (1949).

at its meaning and that, therefore, it failed to meet the standards required by due process of law. Mr. Justice Jackson, in dissenting on similar grounds, concluded that the statute posed a serious infringement upon the First Amendment, particularly in that it narrowed the activities of the people in as sensitive an area as their access to Congress.[18]

PROCEDURE

McAllister v. United States[19] raised two interesting collateral questions which, while not part of the holding, were commented upon by Mr. Justice Frankfurter in dissenting.[20] It would appear that certiorari was granted in this matter purely to review the sufficiency of the findings of the District Court in a negligence action under the Suits in Admiralty Act.[21] In his dissent, Mr. Justice Frankfurter commented upon the fact that the case exposed the urgent need for some type of workmen's compensation legislation covering seamen and also stressed the absence of sufficient grounds for the granting of certiorari. It would appear from a reading of the opinion that no question of law of the type normally contemplated by the Supreme Court when it grants certiorari was present, but rather only an interpretation of facts bearing on the issue of causation. The technique of the writ of certiorari had its inception because of recognition that the Supreme Court should not be resorted to except in instances that posed serious legal policy questions. It would appear that sympathy for a ward of the admiralty presented in a difficult case has set an unnecessary and burdensome precedent involving the scope of review by the Supreme Court.

ADMINISTRATIVE LAW

Exhaustion of Administrative Remedies

In *International Longshoremen's and Warehousemen's Union v. Boyd*[22] the Court concluded that the absence of finality of administrative action precluded review of the agency stand. In that case, plaintiff was a union whose members worked during the spring, winter, and fall on the west coast of continental United States and during the summer in Alaska under collective bargaining agreements. The question arose under the Immigration & Nationality Act of 1952,[23] which provided that all aliens seeking admission to the continental United States from Alaska, even those previously accepted as permanent United States

18. 347 U.S. at 635.
19. 348 U.S. 19 (1954).
20. 348 U.S. at 23.
21. 41 Stat. 525, 46 U.S.C.A. §§ 741-752 (1920).
22. 347 U.S. 222 (1954).
23. 8 U.S.C.A. §§ 1101-1503.

residents, shall be examined as if entering from a foreign country with a view to excluding them on any one of the general grounds applicable to aliens generally.[24] This requirement created an acute problem for the union and its members, many of whom were lawful alien residents. The union contended that Congress did not intend to require alien workers to forfeit their right to live in this country because they went to Alaska to engage in lawful work under a lawfully authorized collective bargaining contract. The defendant Immigration & Naturalization Service announced that the union's interpretation was wrong and that workers going to Alaska would be subject to examination and exclusion. The union then commenced an action to enjoin the defendant from so construing the Immigration & Nationality Act of 1952 and sought declaratory relief to the same effect. The Court said, through Mr. Justice Frankfurter: "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise."[25] This, he said, is not a lawsuit to enforce or determine a right; it is an endeavor to obtain the assurance of the Court that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. The determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

The inflexibility of the Court's position with respect to "finality" is harsh for the result of the ruling requires a worker to risk deportation in the course of his right to work in order to determine the illegality of the provision in question.

Communications

In *F.C.C. v. American Broadcasting Co.*[26] the Court, in a unanimous opinion, held that give-away programs were not within the criminal statute prohibiting the broadcasting of any lottery, gift enterprise, or similar scheme offering prizes dependent upon lot or chance,[27] and that the F.C.C. rules attempting to prohibit such programs by licensing were invalid. At issue was the validity of an F.C.C. order adopting certain interpretive rules in relation to radio and television give-away programs. It would appear at first glance that the Court would have been com

24. 8 U.S.C.A. § 1182(d)(7) (Supp. 1954).
25. 347 U.S. at 223-224.
26. 347 U.S. 284 (1954).
27. 18 U.S.C.A. § 1304 (1948).

pelled to uphold the F.C.C. rulings under the doctrine of *Gray v. Powell*,[28] which limits the scope of review to that available in the case of findings of fact and concludes that administrative action must be upheld if it is reasonable. In the present situation, the Court found that the F.C.C. authority to enforce the criminal prohibition was limited by the scope of the statute, and since the programs in question were not illegal under the statute, the Commission could not employ the statute to make them so by agency action. One may therefore conclude that in this case the Court was not reviewing the reasonableness of the F.C.C.'s action but the correctness of statutory interpretation in a situation where an adverse interpretation would collaterally make a non-criminal act criminal.

Labor Law

In *Radio Officers' Union v. NLRB*[29] the Supreme Court, with two dissents, held that the Taft-Hartley Act[30] did not eliminate the doctrine of *Republic Aviation Corp. v. NLRB*,[31] under which an administrative finding can be based upon a reasonable presumption or inference drawn from the facts, even though such finding is not supported by affirmative evidence in the record. The issue in the *Radio Officers' Union* case involved orders of the NLRB enforcing the provision of the act making it an unfair labor practice for a union to encourage or discourage union membership by means of discrimination. It was contended that the Board's orders should not have been enforced by the Courts because the record did not include independent proof that encouragement of union membership actually occurred. The Board argued on the theory of the *Republic Aviation Corp.* case that actual encouragement need not be proved, but that a tendency to encourage was sufficient, and such tendency was sufficiently established if its existence could reasonably be inferred from the character of the discrimination. The majority of the Court accepted this argument.

Public Tort Liability

United States v. Gilman[32] construed the right of the United States Government under the Federal Tort Claims Act[33] to indemnification from one of its employees after it had been held liable under the act for the negligence of the employee. In the unanimous opinion, the

28. 314 U.S. 402 (1941).
29. 347 U.S. 17 (1954).
30. 29 U.S.C.A. §§ 151-166.
31. 324 U.S. 793 (1945).
32. 347 U.S. 507 (1954).
33. 28 U.S.C.A. §§ 1346 (Supp. 1954), 2671-2680.

Court held that the government had no right of indemnity against an employee whose negligence had made it liable for damages. The Court said that while a private employer clearly has a common law right of indemnity, to apply the common law here would involve grave consequences upon the relations between the United States and employees. It would appear that the Court felt that if evils were to flow from this situation, it was the duty of Congress to act.

CRIMINAL LAW

One of the important decisions in the field of criminal law was that of *Leyra v. Denno*.[34] In this case, the defendant was indicted on a charge of having murdered his parents with a hammer. Thereafter, and largely by reason of certain alleged confessions, he was convicted and sentenced to death. The New York Court of Appeals reversed,[35] holding that one of the confessions made to a state-employed psychiatrist had been extorted by coercion and promises of leniency in violation of state law, the state's due process clause, and the Fourteenth Amendment to the Constitution.

Leyra was retried. Although the state did not again use the invalidated confession, it did re-use three other confessions. These had been made by Leyra within three hours after the invalidated confession, first to a police officer, then to a friend, and finally to two state prosecutors. The trial judge submitted the question of voluntariness of these confessions to the jury. Conviction followed and the death sentence was imposed. On appeal, the New York Court of Appeals affirmed.[36] An application was made to the United States Supreme Court for a writ of certiorari. The Supreme Court denied certiorari.[37]

Thereafter, the petitioner filed a petition for a writ of habeas corpus in the United States District Court charging that the confessions used against him had been coerced, depriving him of due process of law. The District Court gave consideration to the petition and denied it.[38] The Court of Appeals for the Second Circuit affirmed the denial.[39] The petitioner then applied for a writ of certiorari to the United States Supreme Court, which this time was granted.[40] The Supreme Court reversed the conviction on the ground that the use of the confessions in the manner

34. 347 U.S. 556 (1954).
35. 302 N.Y. 353, 48 N.E. 2d 553 (1951).
36. 304 N.Y. 468, 108 N.E. 2d 673 (1952).
37. 345 U.S. 918 (1953).
38. 113 F. Supp. 556 (S.D. N.Y. 1953).
39. 208 F. 2d 605 (2d Cir. 1953).
40. 347 U.S. 926 (1954).

set forth was not consistent with the due process of law required by the Constitution.

You will notice that the Supreme Court had first denied a writ of certiorari when the matter came up on a petition to review the decision of the New York Court of Appeals. But when the United States District Court and the Court of Appeals refused to overturn the decision of the New York State courts and the matter was presented on an application for a writ of habeas corpus, the Supreme Court then did grant a writ of certiorari and reversed. The effect of this decision is to give certain lawyers the feeling that a defendant convicted in the state courts is entitled to two runs for his money. It is well illustrated by the case of the Readers Digest killers,[41] which completed its third round through the courts. Their conviction was sustained all the way through the state courts.[42] On writ of certiorari the Supreme Court affirmed.[43] Defendants then instituted a new proceeding, by a petition for a writ of coram nobis, to raise a point which had been thoroughly argued and decided in the state courts and which the Supreme Court had refused to review by affirming. This had to be considered by a judge in the County Court who denied the writ. It was thereafter argued in the Court of Appeals which affirmed the judgment.[44] The Supreme Court denied certiorari.[45]

Defendants then proceeded to institute a new proceeding in the United States District Court by a petition for a writ of habeas corpus raising a point which had been presented in the petition for a writ of coram nobis, a point which had been thoroughly argued and decided in the state courts and which the Supreme Court had refused to review by denying the writ of certiorari. The point raised in the petition for a writ of habeas corpus then had to be considered by a judge in the District Court. He denied the writ.[46] It was thereafter argued in the Court of Appeals which sustained the District Court.[47] An application for a writ of certiorari was then filed in the Supreme Court, and the Supreme Court denied certiorari on June 6, 1955.

If there is anything which is going to bring discredit upon the administration of the criminal law, it is this type of procedure which involves interminable delays. Of course, the United States Supreme Court has taken the position that a denial of a writ of certiorari is not neces-

41. People v. Cooper, 303 N.Y. 856, 104 N.E. 2d 917 (1952).
42. People v. Cooper, 303 N.Y. 982, 106 N.E. 2d 63 (1952).
43. Stein v. New York, 346 U.S. 156 (1953).
44. People v. Cooper, 307 N.Y. 253, 120 N.E. 2d 813 (1954).
45. Cooper v. New York, 348 U.S. 878 (1954).
46. Cooper v. Denno, 129 F. Supp. 123 (S.D.N.Y. 1955).
47. U.S. ex rel. Cooper v. Denno — F. 2d — (2d Cir. 1955).

sarily a determination by it of the issues of the case. Justification of this position may be apparent, but it is hard to convince the average layman that criminal justice is proceeding with expedition when, as in the case of the Readers Digest murders, five years have elapsed since the date of the crime, and they are still having court arguments on matters which had been presented once before for determination and where the original petition for certiorari was denied. A bill is in Congress supported by the Attorneys General of the various states to put appropriate limitation on this type of proceeding.

Irvine v. California[48] further jacketed application of the prohibitions of the Fifth Amendment to the states under the Fourteenth Amendment. In that case, the Court split 5-4 in holding that the admission of evidence obtained by illegal entries into one's home in a criminal action in the state court was not so abhorrent as to require reversal of the conviction on the ground that the rights and privileges guaranteed by the Fourteenth Amendment were violated. Plaintiff had been convicted of bookmaking and related offenses under the anti-gambling laws of California. Substantially all of the evidence introduced against him had been obtained through invasion of the privacy of his home in his absence. Police officers had obtained a duplicate key to his home, entered and re-entered so as to set up a system of microphones, drilled a hole in the roof of his home so as to connect these microphones to outside lines, thus enabling officers to overhear incriminating statements, and thereafter, without a search warrant, used the key to enter his home and secure evidence. Adhering to the decision in *Wolf v. Colorado*,[49] the Court held that the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure in a prosecution in a state court for a state crime. The Court distinguished *Rochin v. California*,[50] on the ground that the element of coercion or physical assault was lacking in the instant situation. Although condemning the unabridged deprivation of a citizen's protection against unreasonable search and seizure, the Court reiterated and reaffirmed the decision in the *Wolf* case. It stated that the mere fact that an unjustifiable wrong had been done should not upset a justifiable conviction, and that the remedy to assure that one be secure in his home against unreasonable searches is an action under the Criminal Code against the offending law officers. With this in mind, the Court suggested that a copy of the record be sent to the Attorney General of the United States. Justices Black, Douglas

48. 347 U.S. 128 (1954).
49. 338 U.S. 25 (1949).
50. 342 U.S. 165 (1952).

Frankfurter, and Burton dissented[51] on the ground that a violation of the fundamental rights and privileges guaranteed to an individual by the Constitution, allowed to stand upon the hypothesis that the one whose rights were violated could only protest collaterally by the institution of criminal proceedings, vitiates the very source of strength of the rights.

In *Adams v. Maryland*[52] the Court held that the immunity granted by 18 U.S.C.A. 3486, which provides that no testimony given by a witness in Congressional inquiries shall be used as evidence in any criminal proceeding against him in any court, applies to a proceeding in a state court. In response to a subpoena, petitioner appeared before a Senate Investigating Committee and answered questions which tended to incriminate him. Petitioner did not claim the constitutional privilege against self-incrimination. Petitioner then was indicted and convicted in the state court on evidence adduced from the Congressional hearing.[53] The Court held that the intent of the statute was clear. No assertion of privilege was necessary for its provisions to be invoked in any court, be it state or federal.

States' Rights

The tidelands issue cropped up again in *Alabama v. Texas*,[54] where the Court denied the motions of the states of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act of 1953.[55] In a per curiam opinion, the Court said that the power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation, for it must be borne in mind that Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein. This power, said the Court, derives from article 4, section 3, clause 2 of the Constitution, which says in part:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."

Alabama and Rhode Island contended that resources under the marginal sea were not property either of the United States or of any state, but that the paramount rights in the United States decreed by the Court in *United States v. Texas*,[56] *United States v. Louisiana*,[57] and *United States*

51. Id. at 139-156.
52. 347 U.S. 179 (1954).
53. 202 Md. 455, 97 A. 2d 281 (1953).
54. 347 U.S. 272 (1954).
55. 43 U.S.C.A. §§ 1301-1303, 1311-1314.
56. 339 U.S. 707 (1950).
57. 339 U.S. 699 (1950).

v. California,[58] arose from the sovereignty of the United States and the duty to provide for the common defense, rather than from article 4, section 3, of the Constitution. They urged that these rights were held in trust for all of the states as a federal responsibility, and to cede them to individual states would take away the equal footing among states by extending state power into the domain of national responsibility. This argument was accepted by Justices Black and Douglas, who stated in their dissents that the act's language purports to convey all right, title, and interest of the United States to ocean areas.[59] If valid, the act grants to states all proprietary rights of ownership, the result of which is that the favored state can set forth the purposes to which all others, including states and citizens, may use that part of the ocean or its underlying resources. The dissenters contended that this would raise serious and difficult questions with respect to the authority of Congress to relinquish elements of national sovereignty over the ocean. Said Justice Black: "Ocean waters are the highways of the world"[60] and that the import of the majority's conclusion may be that the government could deed away the Atlantic or Pacific or even the Mississippi River. If Justice Black's contention is correct, it might provide interesting possibilities for Florida real estate salesmen.

MARITIME LAW

In *Alaska Steamship Co. v. Petterson*[61] the Court again extended the doctrine of liability without fault under admiralty unseaworthiness actions. On the strength of *Seas Shipping Co. v. Sieracki*,[62] and *Pope & Talbot, Inc. v. Hawn*,[63] the Court extended the doctrine of liability without fault to include a situation where a longshoreman employed by a stevedoring company was injured on board a ship by part of the stevedoring company's gear. It would appear that this extension of the shipowner's traditional obligation so as to not only encompass situations such as in the *Sieracki* case where longshoremen are injured by the shipowner's gear and equipment but also to include those situations where the injury is produced by the equipment and gear of third party employers, continues the gradual approach towards absolute liability imposed upon the owner for injury received by anyone working on board the ship.

58. 332 U.S. 19 (1947).
59. 347 U.S. at 277, 281.
60. Id. at 278.
61. 347 U.S. 396 (1954).
62. 328 U.S. 85 (1946).
63. 346 U.S. 406 (1953).

POWER OF A STATE TO TAX OUT OF STATE BUSINESS OPERATIONS

In two cases the Supreme Court construed the powers of the respective states to tax business corporations whose operations touch the state. In *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*[64] Nebraska levied an apportioned ad valorem tax on the flight equipment of interstate airlines that landed in the state. Appellant, a foreign corporation which did not have its principal place of business or home port in Nebraska, was an interstate air transport carrier whose aircraft made eighteen stops per day in Nebraska. It challenged the validity of the tax on the ground that it violated the commerce clause of the Constitution (U.S. Const. art. I, § 8, cl. 3). In upholding the tax, the Court said that federal regulation of interstate land and water carriers under the commerce clause has not been deemed to deny all state power to tax the property of such carriers, nor does the existent federal air carrier regulation prevent the Nebraska tax challenged here. Eighteen stops per day was sufficient contact with Nebraska to sustain the state's power to levy the tax, and the appellant was not deprived of its property without due process of law.

In *Miller Bros. Co. v. Maryland*[65] Maryland sought to tax a Delaware corporation whose only contact with the state was that it made deliveries of merchandise purchased in Delaware to customers in Maryland. Appellant was a Delaware department store which only sold directly to customers at its store in Wilmington, Delaware. It did not take orders by mail or telephone. Residents of nearby Maryland came to its store and made purchases, some of which were delivered to them in Maryland by appellant's own truck. Maryland had an excise tax on the use, storage, or consumption of articles sold by the appellant, and it required every vendor to collect and remit the tax to the state. In the course of making deliveries, Maryland seized appellant's truck and the Supreme Court of Maryland held it liable for the use tax on all goods sold in the Delaware store to Maryland residents, however delivered. The Court held that the Maryland taxing act as applied to the Delaware store violated the due process clause of the Fourteenth Amendment (U.S. Const. amend. 14, § 1). It reasoned that a seizure of property by a state under pretext of taxation where there is no jurisdiction or power to tax is confiscatory and a denial of due process, for the Delaware corporation neither by its acts or its dealings had subjected itself to the taxing power of Maryland. Unlike the *Braniff* case, the Court held that there was no definite link nor minimum connection between the state and the department store. The distinction is reasonable.

64. 347 U.S. 590 (1954).
65. 347 U.S. 340 (1954).

ANTI-TRUST

In *Moore v. Mead's Fine Bread Co.*[66] the Court construed the Clayton Act[67] and the Robinson-Patman Act[68] to be broad enough in scope to cover intrastate transactions by a corporation conducting business among and between the states. Petitioner in this action was engaged in the bakery business at Santa Rosa, New Mexico. None of his activities was interstate in character. Respondent was a corporation in the baking business at Clovis, New Mexico. It was, however, one of several corporations having interlocking ownership and management. These corporations maintained plants at Lubbock and Big Spring, Texas, in addition to plants at Hobbs, Roswell, and Clovis, New Mexico. All of their products were marketed under a common name and promoted through a common advertising program. Petitioner and respondent were in competition in Santa Rosa, New Mexico. Respondent, in response to an agreement by the local Santa Rosa merchants to purchase petitioner's produce exclusively, cut the wholesale price of its bread in Santa Rosa from 14 cents to 7 cents for a pound loaf and from 21 cents to 11 cents for a pound and a half loaf. Respondent did not cut its bread prices in any other town. The price war continued for a period of approximately 8 months and as a result, petitioner was forced out of business. The District Court held for the petitioner, and was reversed by the Court of Appeals,[69] on the ground that the injury resulting from the price cutting was to a purely local competitor whose business was in no way related to interstate commerce, or if competition was lessened or a monopoly created, it was purely local in scope and effect. In reversing the Court of Appeals, the Supreme Court found that to fall within the provisions of section 2(a) of the Clayton Act and section 3 of the Robinson-Patman Act, it need not be shown that the acts complained of occurred in interstate commerce, if it could be shown that, as here, the price discrimination consisted of cutting the price of the intrastate sales while maintaining the price of the interstate sales. The Court based its reasoning on the premise that where the beneficiary of the outlawed competitive practices is an interstate industry, even though the act complained of is purely intrastate, if its effectiveness flows from the fact that the participant can rely upon its interstate sales or interstate transactions to cushion the losses of local price cutting, it is a violation of the anti-trust laws. It would appear that this is a sound decision, for to otherwise construe the anti-trust acts would enable large interstate corporations

66. 348 U.S. 115 (1954).
67. 49 Stat. 1526, 15 U.S.C.A. § 13(a) (1936).
68. 49 Stat. 1528, 15 U.S.C.A. § 13A (1936).
69. 208 F. 2d 777 (10th Cir. 1953).

to absorb the markets of local corporations by effectively destroying their businesses through price cutting, while absorbing the resulting deficits through their out of state operations in which they had not cut the prices.

TAXATION

In four cases: *Holland v. United States,*[70] *Friedberg v. United States,*[71] *Smith v. United States,*[72] and *United States v. Calderon,*[73] the Court considered the net worth method of proof used by the Bureau of Internal Revenue to convict willful evaders of income taxes. This was not the first time that the Court had occasion to pass upon the application of the net worth theory, having passed upon the theory in *United States v. Johnson,*[74] a situation where the taxpayer had no records. However, subsequent to that time, the Department of Justice has expanded its use of the net worth theory to encompass almost all income tax evasion actions and these cases were the first in which the Supreme Court focused its attention upon the serious doubts of numerous lower courts regarding the implications of the net worth method.

In a typical net worth prosecution, the government, having concluded that the taxpayer's records are inadequate, as a basis for determining income tax liability, attempts to establish the total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net value of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's non-deductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the government claims the excess represents unreported taxable income.

In the *Holland* case petitioners claimed that the government failed to include in its opening net worth figure $104,000 of currency accumulated before 1933. The government introduced no direct evidence to dispute this claim, but relied on the inference that anyone who had $104,000 in cash would not have undergone the hardships and privations shown to have been endured by petitioners during the 1926-1940 period. The government also introduced evidence which showed that the defendants owned a hotel to which they made improvements in the period 1946-

70. 348 U.S. 121 (1954).
71. 348 U.S. 142 (1954).
72. 348 U.S. 147 (1954).
73. 348 U.S. 161 (1954).
74. 319 U.S. 503 (1943).

1948 and acquired other assets during that period, all of which were bought in installments, as if out of earnings rather than accumulated cash; and that petitioners' income tax returns, as far back as 1913, showed that their income was insufficient to enable them to save any appreciable amount of money.

In upholding the use of the net worth theory in this instance, the Court said that the need for its use in establishing deficiencies in criminal prosecutions where income is elaborately concealed is so great that although the scope and latitude allowed prosecutors by the use of the net worth method is disturbing, it is necessary for the apprehension of violators. However, the dangers for the innocent that are inherent in the net worth method of proof require the exercise of great care and restraint. Trial courts should approach such cases with the realization that taxpayers may be ensnared in a system which though difficult for the prosecution to utilize, is equally hard for the defense to refute.

The Court therefore laid down certain ground rules for such prosecutions. It said that charges to the jury should be especially clear and include, in addition to the formal instructions, a summary of the nature of the net worth method, the assumption on which it rests, and the inferences available both for and against the accused. This is so because of the number of necessary inferences required to be drawn in a situation where the prosecution must always prove the criminal charge beyond a reasonable doubt.

Where there are no books and records, the jury may infer willfulness from that fact coupled with proof of an understatement of income; but when the government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might not be justified especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation.

When the taxpayer offers no relevant explanation of the increases in his net worth, the government is not required to negate every possible source of non-taxable income.

Like all other requirements that stem from the benefits received in a complex society, the utilization of the net worth theory imposes serious burdens upon the government, the taxpayer, and the Court. However, the Court would seem to have laid down appropriate checks on the use of the theory so as to protect a defendant and afford to him that presumption of innocence which clothes every defendant.

These few decisions which I have discussed mark some of the large and difficult problems with which the Supreme Court has to wrestle.

Judge Cardozo, in his wonderful book on "The Paradoxes of Legal Science", once said:

> "The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law." (p. 4)

Nowhere do these great problems become so sharply focused as when they reach the Supreme Court of the United States. I think that all of us in this country can be proud that we have in that Court Justices qualified and competent to work out the solutions of these fundamental problems.